78-1121

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

HARLAN E. ORR, Petitioner

v.

THE ARGUS—PRESS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES J. KOBZA,
Attorney
407 Muskegon Federal Savings Bldg.
Muskegon, Michigan 49440

WILLIAM C. MARIETTI,
Attorney
820 Terrace
Muskegon, Michigan 49440

AMERICAN BRIEF AND RECORD COMPANY, 125 WEALTHY STREET, S.E.,
GRAND RAPIDS, MICHIGAN 49503 — PHONE GL 8-5326

INDEX

CITATIONS

Cases:

Constitution:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO.

HARLAN E. ORR, Petitioner

v.

THE ARGUS—PRESS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

James J. Kobza and William C. Marietti, counsel for Harlan E. Orr, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, pp.) is not reported at this time. The written opinion of the district court (App. C. infra, pp.) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, infra, pp.) was filed on October 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether First Amendment standards of evidence insulate respondent from an actual and punitive damage jury award.

STATEMENT

This is a diversity case, brought by petitioner while a resident of Wisconsin against a Michigan corporation doing business in Owosso, Michigan.

Petitioner, Harlan E. Orr, began practicing law in 1923 in Indiana, and retired in 1965. He began to develop small shopping centers, and started such a project in Owosso, Michigan in mid-1973.

He planned to solicit financing from local investors and secured legal assistance from an Owosso attorney. Five potential equity investors had paid in a total of $27,500 when Mr. Orr decided this course was not about to succeed. Through his attorney, all money paid in was returned in September, 1973.

On November 19, 1973, Mr. Orr was arrested on fifteen counts of alleged Michigan Securities Act violations.*

The respondent, Argus Press Company, assigned reporter Herbert Haase to cover the district court arraignment. His main source was a phone call to the court clerk. When his editor asked if he attended the arraignment, the reporter lied and said he had done so.

The editor told him to change the wording of the Associated Press wire story on the arrest. The reporter submitted an article which was printed in the November 20, 1973 edition of the Argus-Press, above its masthead. The story claimed that Mr. Orr had been charged with (34) "counts of

* Trial Exhibit 66. On August 21, 1974, all original charges were dismissed against both arrestees, with each entering a no contest plea to an added misdemeanor charge.

fraud, in connection with a *phony* shopping mall investment *scheme* that allegedly sought to take $250,000 from local investors . . ."; That Mr. Orr was implicated in an alleged "*swindle*" (underlined are libel charged); (App. A, infra pp.).

The indictment was carefully drawn, avoiding sections of the law proscribing "scheme to defraud" and "fraud or deceit". These words do not appear in the court record of indictment.*

Mr. Orr demanded a retraction, the respondent's attorney admitted the story should have been handled different than it was, drafted a retraction, but failed to have it printed. (R Ex 55, pp. ; R 464).

Shortly after the retraction demand was received, the reporter destroyed his notes on the story.

Mr. Orr's business and personal life was devasted by this erroneous report of the charges brought against him.

The jury returned a verdict for plaintiff Orr in the amount of $5,000 actual damages and punitive damages of $15,000 (App. A, infra pp.).

The trial court denied respondent's motion for judgment notwithstanding the verdict and for a new trial (App. C, infra pp.). The court explained its ruling by summarizing that the jury could believe from all testimony that the newspaper had injected speculation, rumor, and suspicion in order to spectacularize the account, and could conclude that respondent had a high degree of awareness that material it added to the AP release was in all probability false. The newspaper's witnesses lacked credibility. Reckless disregard for truth was a valid conclusion for the jury to reach (App C, infra, pp.).

* Trial Exhibit 66. On August 21, 1974, all original charges were dismissed against both arrestees, with each entering a no contest plea to an added misdemeanor charge.

The newspaper appealed, mainly claiming, as at post trial motion hearing, the evidence insufficient to support the punitive damage portion of the verdict. The court of appeals agreed, and, in addition, found Mr. Orr a "public figure" reversing the entire judgment (App A, infra, pp.).

REASONS FOR GRANTING THE PETITION

This case was tried under Michigan libel law and statutes, but throughout the trial both parties agreed the "reckless-disregard-for-truth" requirement of *Time Inc.* v *Sullivan*, 376 US 254, applied to the case; both to overcome Michigan's common law qualified privilege,* and to support punitive damages.

The trial court thought the evidence presented a jury question, the jury found such "reckless disregard", but the court of appeals disagreed and reversed.

A substantial question is involved in this case as the lower court's reversal appears in contradiction to this Court's rulings in *Butts* v *Curtis Publishing Co.*, 388 US 130, rehearing denied 389 US 889.

It is distinguishable from *Greenbelt Coop. Publ Asso.* v *Bresden*, 398 US 6, in that here the judge's instruction to the jury correctly stated the *Times* rule (R 1077), and the news report of Mr. Orr's arraignment proceedings was not an "accurate and truthful report" (id., p. 11).

It is also distinguishable from *Time Inc.* v *Pape*, 401 US 279 in that the court arraignment documents were never examined, and if they had, would have disclosed charges mainly of technical violations-failure to register securities.

Further, the appeal court's holding that Mr. Orr was a "public figure" appears contrary to this Court's rulings in

* *Lawrence* v *Fox*, 357 Mich 134, 97 NW 2d 719; the standard more recently affirmed in *Piesner* v *Detroit Free Press Inc.*, 82 Mich App 153, 266 NW 2d 693 (allowing case to trial).

Gertz v *Welch*, 418 US 323, and *Time Inc.* v *Firestone*, 424 US 448.

This case presents one facet which has not been previously before the Court. Do the actions of respondent's agents immediately following the publication furnish the better proof of its disregard for truth?

There are numerous federal and state court cases which have been dismissed by failing the "reckless disregard for truth" standard, and others with like facts which have succeeded to judgment. The Court may desire to review this standard, under the instant case situation, giving it either more or less substance for direction of the lower courts.

CONCLUSION

Consideration of this petition should be allowed.

Respectfully submitted:

JAMES J. KOBZA
WILLIAM S. MARIETTI
Attorneys

January, 1979

APPENDIX

APPENDIX A

UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 76-2206

HARLAN E. ORR,
Plaintiff-Appellee,

v.

THE ARGUS-PRESS COMPANY,
Defendant-Appellant.

ON APPEAL from The United States District Court for the Eastern District of Michigan.

Decided and Filed October 19, 1978.

Before: PHILLIPS, Chief Judge; CELEBREZZE and MERRITT, Circuit Judges.

MERRITT, Circuit Judge. In this diversity case, following a jury trial in the United States District Court for the Eastern District of Michigan, appellant, the Argus-Press Company was found liable for $5,000 compensatory damages and $15,000 punitive damages for publishing an allegedly libelous article regarding the indictment and arrest of Harlan Orr, appellee, on charges of securities fraud. We conclude that "actual malice" is the standard to be applied in the present case, both under the "qualified privilege" developed at common law in the courts of Michigan and under the first amendment, as interpreted by the Supreme Court in *New York Times Co.* v *Sullivan*, 376 U.S. 254 (1964), and later cases. While the malice standards are somewhat different under Michigan law and under the first amendment, both of those standards protect the newspaper from liability in the

context of this case. We therefore vacate the judgment below and remand the case to the District Court to dismiss plaintiff's suit with prejudice.

I. STATEMENT OF THE CASE

A. Conduct of the Parties

Orr, a Wisconsin attorney and president of the J.M.H. Development Company, proposed to build a shopping mall in Owosso, Michigan. The venture was publicized in the local press, in part as a result of efforts by Orr and his associates to obtain publicity. To raise money, Orr prepared and distributed to local investors a prospectus describing the project. Orr was attempting to raise $250,000 through stock sales but, in fact, received only $27,500 from five local investors. The project fell through, and the investments were returned.

In November, 1973, Orr and a business associate were indicted in connection with the venture on a total of thirty-four charges of violations of the Michigan securities laws. Orr himself was charged with fifteen counts. Five counts charged the unlawful sale of unregistered stock; eight counts charged the unlawful failure to disclose information; two counts charged affirmative acts of deceit, alleging that Orr had told two potential investors that J. C. Penney Company, a large department store, had already leased space in the proposed mall when, in fact, the company had not done so.

After Orr's indictment and arrest, the Argus-Press published the following story. We italizize the words which Orr contends are libelous:

> "Two Charged in Shopping Mall *Fraud*":
>
> A former Owosso man and his business partner have been charged with a total of *34 counts of fraud* in connection with a *phony shopping* mall investment *scheme that allegedly sought to take* $250,000 from local investors according to Shiawassee County Sheriff's Dep. Herb Runyon.

> Merlin Goodrich, 39, now of rural Muskegon, and Harlan E. Orr, 71, president of the J.M.H. Development Corp., Muskegon, were taken into custody on the charges by Muskegon County Sheriff's deputies Monday and transferred to the Shiawassee County Jail later in the day. Goodrich is *charged with 19 counts of fraud, Orr, with 15.*
>
> Following arraignment this morning a preliminary examination for Goodrich was scheduled in District Court for Jan. 8 and his bond was set at $2,000. A December preliminary examination was scheduled for Orr, whose bond was set at $5,000.
>
> Charges against the two men stem from a proposed Chippewa Mall investment project, to be developed by J.M.H. Development, which the men claimed was to have been built on five parcels of land along E. M 21, between Herb's Auto Parts and the Owosso Auto Auction, Runyan said.
>
> Goodrich, who listed his occupation as pastor of a Muskegon church, and Orr reportedly approached area persons last April seeking twenty-five $10,000 investment subscriptions for the proposed 30-store, $250,000 mall. Runyan said the men had obtained five local subscriptions totaling $27,500, but that the monies had been returned to the investors Sept. 21 after a joint investigation of the project was under way by the securities division of the Michigan Department of Commerce, the county sheriff's department and Owosso post state police.
>
> Returning the money did not stop prosecution, Runyan explained, because *the fraud charges* are for the alleged sale of unregistered securities and for the alleged misrepresentation of securities offered for sale. The two men reportedly claimed the J. C. Penney Company had agreed to build an anchor store in the mall. Penney Company officials denied the claim, Runyan said.

Investigation of the project began when a local person involved in the investment transactions turned over evidence to detectives at the county sheriff's department, Runyan said. He added that at least 10 other persons and representatives of Newell Real Estate, 440 Corunna Ave., and Walker Realty, 211 E. Williams St., the two real estate firms which were handling the land for the project, had given statements implicating Goodrich and Orr in the *alleged swindle*.

Each charge of *fraud* against Goodrich and Orr carries a maximum sentence of three years in prison or a $5,000 fine, or both. [Emphasis added.]

Orr concedes that the basic factual statements contained in the story are true, but he objects to the characterization of his dealings as an "alleged swindle" and as "a phony shopping mall investment scheme that sought to take $250,000 from local investors." He also challenges the newspaper's description of the indictment as charging "fraud."

B. The Jury Instructions of the District Court

The District Court charged the jury that it should apply Michigan's common law privilege of fair comment, as follows:

> Under the Common Law rule of privilege, [there] is a qualified privilege for publications which are made in good faith on a matter of public concern and interest. The alleged libelous article published by the defendant in the Argus Press is entitled to this privilege if the article was published in good faith and without malice, for the criminal charges against plaintiff . . . was a matter of public concern and interest . . . . [An article is not published in good faith] if it is published either with knowledge of its falsity or with reckless disregard as to whether it is false or not. In order for a newspaper to have been reckless with regard to whether the article was false, the newspaper

> must have a higher degree of culpability than mere negligence or a failure to exercise reasonable care. Recklessness requires the defendants to have a high degree of awareness of the probable falsity of the article published.
>
> The language of this charge combines the language of Michigan's common law privilege with the language of the First Amendment privilege, as announced by the Supreme Court in a series of cases beginning with *New York Times* v *Sullivan, supra*.

The District Court left to the jury the question of whether the state's accusations against Orr amounted to fraud. The charge strongly suggests that the Court believed that the newspaper unfairly described the charges as "fraud":

> You must determine whether the alleged libelous article, when taken in its entirety and plain and nature meaning, expresses a fair and true report of the charges filed against the plaintiff and whether any inaccuracies would have changed the effect on the reader . . . . The article in question refers to these charges as being fifteen counts of "fraud."
>
> The term "fraud" has various meanings under the law. The general meaning of fraud is to induce another person to part with a valuable thing by means of deception, as by the intentional concealment of the truth.
>
> The Michigan securities law [de]fines:
>
> "Fraud" more broadly and does not require any intent to deceive. For purposes of this act, fraud includes anything less than full disclosure of a matter where lack of full disclosure would be misleading to a purchaser of securities. *Thus, the charges against plaintiff of misrepresentation cannot be considered as charges of fraud within the meaning of that Act.*

Since the term "fraud" has various meanings, the use of the term would be accurate but not fair. [Emphasis added.]

The jury apparently found that the words "fraud" and "swindle" were not justified by the facts that the newspaper acted with "malice" in publishing the article. We hold that on the specific facts of this case a jury could not reasonably find that the newspaper's characterizations of the proceeds were sufficiently inaccurate to permit a concomitant finding that the newspaper published article with "malice."

II. COMMON LAW LIBEL UNDER MICHIGAN LAW

Few areas of the law are as analytically difficult as that of libel and slander where courts attempt to mesh modern, first amendment principles with common law precedents. For the sake of clarity, we will discuss first the state law issues, then the Constitutional problems presented by this case; but as a legal and practical matter, the two approaches are found together.[1]

Initially, we consider the issues presented in this case under Michigan law: Is the article substantially true? If not, has the plaintiff proven that the newspaper published the story in bad faith?

A. The Defense of Truth

First, as the district court instructed the jury, the article is not libelous if substantially true. "To be true," the court correctly stated, "it is not essential that the literal truth be established in every detail as long as the article contains the gist of the truth as ordinarily understood." We believe that

[1] For a clear picture of the landscape in this changing area of the law, as well as a good description of the influences which are changing it, see Dean John Wade's lecture entitled "The Communicative Torts and the First Amendment," printed in 48 Miss. L.J. 671 (1977).

most, if not all, of the reporter's story on Orr is substantially truthful and therefore not actionable.

Neither Orr's complaint nor the opinion of the district court identified any specific, factual errors in the article. The story correctly reports that Orr was arrested and charged in a fifteen count indictment with various violations of the Michigan securities laws including making false statements to local investors that the J. C. Penny Company had agreed to lease a store in the proposed shopping center. It is also not disputed that the newspaper accurately reported the circumstances surrounding the shopping mall plan, including the amount of money Orr was trying to raise, the fact that the money was later returned, and the statements attributed to Deputy Runyon concerning the investigation.

The basis for Orr's complaint is the newspaper's characterization of Orr's activities as a "fraud," and "alleged swindle," and as "a phony shopping mall investment scheme that allegedly sought to take $250,000 from local investors." These expressions cannot easily be labled as "facts" or as "opinion." At least in regard to the use of the words "fraud" and "swindle," however, we believe that the use of those words as statements of fact was substantially accurate.

Contrary to the District Court's instructions to the jury suggesting that the word "fraud" is unfair in the context of this case, we believe it is both accurate and appropriate to describe a violation of Michigan's securities laws. The language of the state statute under which Orr was charged simply repeats the language of SEC Rule 10b-5, 17 C.F.R. §240.10b-5 (1977), adopted under the 1934 Securities Exchange Act, 15 U.S.C. 78j(b) (1976), which prohibits various forms of securities fraud. Both the Michigan courts, *People* v *Dempster*, 51 Mich. App. 612, 615, 216 N.W.2d 81, 82 (1974), and the courts of the United States, *Affiliated Ute Citizens* v *United States*, 406 U.S. 128 (1972); *SEC* v *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), have generally described the charges under these laws involving securities "fraud."

While the word "swindle" may imply more serious wrongdoing that was involved here, the word is frequently used used in colloquial speech as a substitute for "defraud." During the course of oral argument, in fact, Orr's attorney conceded, as he was bound to do, that if someone is accused of taking money from people by lying to them, the word "swindle" is a fair characterization of his actions. Although the word also connotes bad motive and an intent to defraud, the story as a whole sets forth sufficient facts concerning the circumstances of Orr's indictment and arrest for the reader to draw his own conclusion as to Orr's motives.

Much the same argument can be made that the characterization of Orr's actions as a "phony" scheme that sought to "take" $250,000 from local investors is the "gist of the truth." Certainly, Orr did "take" money from several local investors in attempting to raise a total of $250,000. The state did not charge in precise language that the whole plan was "phony." At least one part of it, the fictitious J. C. Penney lease, was plainly "phony" according to the indictment, and in view of the inferences in the indictment that Orr's development company was underfinanced, the word "phony" is not an unreasonable characterization of the whole enterprise.

At the same time, it is also true that the words "take" and "phony," like "swindle," were ill chosen and might well convey to many readers the impression that Orr was merely a flimflam artist planning to "take the money and run." The facts set out in the rest of the story, however, do no justify those inferences about the plaintiff. Thus, while we think the district court might well have directed a verdict at the close of the case on the ground that the evidence was insufficient to establish the article as a whole was an untrue description of the indictment, we do not rest our decision on that basis.

B. The Fair Comment Privilege

The newspaper's second, principal defense under Michigan law is that the plaintiff must prove that the newspaper

published the article in "bad faith" or with "ill will." As a story about a matter of public concern, the article is protected under state law by the qualified privilege of "fair comment." *Lawrence* v *Fox*, 357 Mich. 134, 97 N.W.2d 719 (1959); *Miner* v *Detroit Post and Tribune Co.*, 49 Mich. 358, 363-365 (1882) (Cooley, J.). *See* RESTATEMENT OF TORTS, §§606, 607 at 275-285 (1938). *Accord, Nuyon* v *Slater*, 372 Mich. 654, 127 N.W.2d 369 (1964); *Bufalino* v *Maxon Brothers, Inc.*, 368 Mich., 140, 153; 117 N.W.2d 150, 156 (1962). Everyone, citizen or reporter, has the right to comment on matters of public importance, and expressions of opinion and even misstatements of fact are not actionable in a libel suit unless made maliciously for the purpose of damaging another's reputation.

Negligence on the part of the newspaper is not sufficient to establish liability. Scienter is required. If the statement "be honestly believed to be true, and published in good faith," there is no scienter and no liability. *Lawrence* v *Fox*, *supra*, 97 N.W.2d at 723, *quoting Powers* v *Vaughan*, 312 Mich. 297, 305, 20 N.W.2d 196, 199 (1945), and *McAllister* v *Detroit Free Press*, 76 Mich. 338 (1889). As long as the defamatory opinion is honestly held or the misstatement of fact is believed in good faith to be true, the statements are protected by the privilege.

As previously set forth, the charge to the jury accurately stated the Michigan privilege of fair comment and the applicability of that standard is not questioned by either party before us.

The District Court's opinion relied principally upon the following evidence as demonstrating the newspaper's bad faith:

> The newspaper's witnesses admitted that the article as published did not follow the Associated Press printout. The article was prepared in haste with the acting editory directing the reporter to change the story so that it did not merely repeat the story pro-

vided by the Associated Press. This the reporter did, and although the reporter testified that the change was based on his notes from interviews with Deputy Runway, these notes were not produced but were claimed to have been lost.

This "evidence" does not warrant a finding of bad faith. That the newspaper ordered the reporter to rewrite an Associated Press account of Orr's indictment hardly demonstrates bad faith; it is standard practice. By rewriting the wire service story and adding additional information, the newspaper may then run the article under the by-line of one of its own reporters rather than as an Associated Press story.

Under any interpretation of the evidence, to allow this jury verdict to stand would turn the "malice" standard, the bad faith requirement, into a bare fiction. There is no evidence at all in the record to support a reasonable inference that the reporter or the editor for the newspaper did not believe that the state had charged Orr with fifteen counts of securities "fraud" involving a scheme to obtain or "take" money from investors by misrepresentation.

The District Court's error in its instructions in discussing the word "fraud" may explain why the jury went astray in this case, or the case may be a good example of the validity of Dean Prosser's criticism apparently shared by Dean Wade, that the "malice" standard may be so subjective and confusing to a jury as to be meaningless and vanish into a standard of strick liability. W. Prosser, Law of Torts, §115 at 795, §118 at 821 (4th ed. 1971); *Wade, supra* n. 1, at 686. The jury must have concluded, based on the court's instructions, that the use of the world "fraud" to describe the charges against Orr was incorrect or unfair. Despite the court's instructions on malice, the jury must have then viewed the defendant as strictly liable for its error.

Whether this is an accurate analysis of the jury's deliberations is beyond our competence, but there is no evidence in this record that the newspaper thought its story was false or

investigated and wrote the story with the kind of "I-don't-care-about-the-truth" state of mind that would be the requirement of scienter under the subjective standard. This case suggests that courts must be careful about letting libel cases go to the jury under the standard where there is no proof that the reporter of the newspaper knew or suspected that the statements in the article were false. *See Nuyen* v *Slater, supra,* 127 N.W.2d at 373; *Raymond* v *Croll,* 233 Mich. 268, 275-76, N.W. 556-558 (1925) ("If the circumstances relied on as showing malice are as consistent with its nonexistence as its existence, the plaintiff has not overcome the presumption of good faith and there is nothing for the jury.)

III. FIRST AMENDMENT PRINCIPLES GOVERNING LIBEL

Many of the state law issues we have just discussed have been subsumed in and altered by constitutional holdings. Our opinion today therefore rest both on state law and the first amendment. The constitutional issues presented are: Whether the defamatory words are protected as statements of opinion? If not, and if we consider the words as statements of fact, was Orr a "public figure" for purposes of the first amendment? If so, did the newspaper act with a reckless disregard for the truth of the statement?

A. Statements of Opinion Protected under First Amendment

It is now established as a matter of constitutional law that a statement of opinion about matters which are publicly known is not defamatory. As the Supreme Court said in *Gertz* v *Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974): "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."

Based on *Gertz* and other Supreme Court opinions, the American Law Institute, in its recent revision of the chapters on libel in the Restatement of Torts, adopted the following statement of the *Gertz* principle:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.
>
> Comment:
>
> c. . . .
>
> It is the function of the court to determine whether the expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct. . . .

RESTATEMENT (SECOND) OF TORTS § 566 (1977).

The ALI illustrates this principle by hypothesizing two cases, one where the defendant writes that the plaintiff "sits around in his back yard with a drink in his hand and therefore must be an alcoholic," and the other where the defendant, without revealing any factual basis, simply says that the plaintiff "is an alcoholic." The first is an expression of opinion based on revealed facts and is, therefore, not actionable, while the second is an expression of opinion based on undisclosed facts. The ALI explains the distinction as follows:

> A simple expression of opinion based on disclosed or assumed non-defamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication.

Id.

Two other illustrations by the authors of the Restatement are relevant to the instant case:

> 1. A real estate developer, was attempting to persuade the city council to grant a zoning variance on certain land which he owned. The city desired to purchase another tract of land owned by him for a school site. In negotiations about the purchase price, A indicated that his agreeing to the city's offer might depend on his getting the variance. At a council meeting this position was described by a council member as blackmail. B, a newspaper, carries a full and accurate account of the council meeting, including a statement of A's negotiating position. It quotes the "blackmail" statement and itself uses that term and the term "skullduggery." The statement cannot be construed as charging that A committed the crime of blackmail and B is not liable for defamation. [The facts and holding of this hypothetical are taken directly from *Greenbelt Cooperative Publishing Ass'n* v *Bresler*, 398 U.S. 6 (1970).]
>
> 2. A, an employee, refused to become a member of the union recognized as the collective bargaining agent. The union publishes statements calling A a scab. In one statement to this effect it publishes a well-known definition of a scab, characterizing him, among other things, as a "traitor to his God, his country, his family and his class." The language cannot be construed as a charge that A was guilty of treason and B is not liable for defamation. [This case is taken from the Supreme Court opinion in *Letter Carriers* v *Austin*, 418 U.S. 264 (1974).]

Id.

If we substitute the words "swindle," "fraud," or "phony scheme" for "skullduggery" or "traitor," we see that, to the extent the allegedly libelous words constitute opinion, as opposed to facts, the words are not defamatory.

In the instant case, as we have discussed, it is not disputed that the reporter accurately reported the underlying facts concerning Orr's indictment and arrest and that the only basis for Orr's complaint is that the reporter characterized the shopping mall proposal in strong terms which implied that the indictment charged that Orr was dishonest and had attempted to defraud local investors. Under the rule adopted by the American Law Institute and our own understanding of the protections of the First Amendment, the newspaper's "opinion" about the meaning of the indictment cannot be made the basis of a libel suit against the newspaper.

B. The First Amendment Principle Requiring "Actual Malice"

If, on the other hand, we consider the allegedly defamatory words as "facts" rather than opinion, the issue becomes more clouded. If the plaintiff is a "public figure," misstatements of fact are not defamatory unless made with knowledge of their falsity or with a reckless disregard for the truth of the statements. *Gertz*, *supra*, 418 U.S. at 334-36 n. 6; *Curtis Publishing Co.* v *Butts*, 388 U.S. 130 (1967); *New York Times* v *Sullivan*, *supra*. The standard is similar in practice to the Michigan "fair comment" privilege. While the state standard emphasizes the subjective good faith of the publisher, the constitutional definition of malice is more concerned with showing the publisher's subjective reckless disregard for accuracy. It is theoretically possible, in other words, that a newspaper might subjectively believe in good faith that a statement is true under state law and, at the same time, publish the statement without sufficient regard for its truth under the first amendment. We do not believe the evidence is sufficient to support a finding of malice under either of the subjective tests. If we convert these subjective

"malice" standards into a more objective test, as suggested by Deans Prosser and Wade and Justice Harlan, we find no evidence that the defendant was guilty of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers." *Curtis Publishing Co.*, 388 U.S. at 155 (Harlan, J.).

1. Interpretation of Official Documents. — A subsidiary first amendment principle concerns statements describing or summarizing official documents. In cases where the plaintiff is *a public figure* for the purpose of the "malice" standard, the Supreme Court has held in *Time, Inc.* v *Pape*, 401 U.S. 279 (1971), that any rational interpretation of a public document is a sufficient defense as a matter of law to a suit for defamation. Specifically, the Court held in *Pape* that a newspaper's choice of one or several possible interpretations of an ambiguous government document is not enough to create a jury issue of "actual malice." The Court observed:

> [A] vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*. Indeed, perhaps the largest share of news concerning the doings of government appears in the form of accounts of reporters, speeches, press conferences, and the like. The question of the 'truth' of such an indirect newspaper report presents rather complicated problems.
>
> . . . .
>
> Where the document reported on is so ambiguous as this one was, it is hard to imagine a test of 'truth' that would not put the publisher virtually at the mercy of the unguided discretion of the jury.

401 U.S. at 285-86, 291.

2. The "Public Figure" Test. — We believe that Orr is a "public figure" for the limited purpose of reporting on his

arrest and indictment and the circumstances surrounding the collapse of his shopping mall proposal. Although not every lawyer and litigant involved in a judicial proceeding is a "public figure," according to the *Gertz* case and *Time, Inc.* v *Firestone*, 424 U.S. 448 (1975), it appears from the reasoning of these opinions that a criminal defendant would be classified as a "public figure" where, as here, his conduct in the community is a legitimate matter of public interest, the press has publicized his conduct in part as a result of his own efforts to obtain publicity, and his conduct has made him the target of a criminal proceeding about which the public has a need for information and interpretation.

There is no doubt that the development of a large shopping complex in the Owosso, Michigan, area was of interest and importance to the people of that region. The Argus Press had previously published — with Orr's cooperation — a front page story about the proposed mall and its developers. When the project later fell through amid charges of fraud and misrepresentation, certainly Orr was a "public figure" within the meaning of the test established in *New York Times, Butts, Gertz* and *Firestone*. He voluntarily sought publicity for his project and then found himself, through his own alleged misdeeds, at the center of a public scandal. We believe that application of the constitutional "actual malice" test is fully warranted under these circumstances and that the *Pape* decision protects the newspaper from a liability as a matter of law. The newspaper's interpretation of the indictment as implying that Orr was attempting a "swindle" or to "take" money from local investors is, as we have previously discussed, a rational interpretation of the charges.

IV. POLICY REASONS JUSTIFYING PROTECTION OF THE PRESS UNDER THE MALICE STANDARD

This case demonstrates the need for principles of libel law which loosen the constraints that a standard of strict

liability would otherwise impose on the press. The adverse publicity in this case arose because the state brought criminal charges against Orr for securities violations, not because the newspaper independently decided to investigate, embarrass, or invade the privacy of an individual about whose conduct the public has no legitimate need for information. Orr was charged with securities fraud in the development of a new center for public shopping in a small community and with misleading potential local investors.

The publicity which the press gives to such cases plays an important role in our system of criminal justice because it informs the public about the law, warns the public of harm and serves to deter law violations. The press functions in such cases as one of the sanctions in our system. Only by receiving information about our legal system, including its defects and mistakes, can the public learn about the law and the moral principles on which it is based, as well as the law's capacity for self correction and stability. In reporting on this case, therefore, the newspaper was simply performing its assigned role.

Like the readers for whom they write, few newspaper reporters are lawyers; yet they must often report under a short deadline complex accusations and arguments in colloquial language that the average reader can understand. Sometimes, as in this case, lawyers have spent hours preparing charges and arguments that the reporter must summarize in a few short paragraphs in a few minutes.

Because of the public importance of reporting on cases of this kind, the law must allow some leeway for misinterpretation and error. Lawyers and judges sometimes make mistakes about the facts of cases, misinterpret the law or state one side of the case too strongly or with words and labels which may be inappropriate. They are insulated from liability for such conduct by an *absolute* privilege, not a qualified privilege. For similar reasons, the common law, and the Supreme Court in construing the first amendment, have erected principles which protect the press from liability

for mistakes when reporting on public proceedings, officials, and persons in whom the community has a legitimate interest and a need for information and interpretation. An individual's interests in privacy, a good reputation, honor and equanimity are important values which the law must continue to protect. These interests must give way in part, however, when the citizen's public deeds arguably harm or seriously affect the interests of a significant number of his fellow citizens.

The judgment below is therefore reversed and the case remanded to the District Court for dismissal of the action.

APPENDIX B

JUDGMENT

At a session of said Court held on the 19th day of October, 1978.

This Judgment is entered upon an appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

On consideration hereof IT IS HERE ORDERED AND ADJUDGED by this Court that the Judgment of the said District Court in this cause be and the same is reversed and the cause remanded for dismissal of the action.

IT IS FURTHER ORDERED that the Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal, as itemized below and that execution therefor issue out of said District Court if necessary.

Entered by Order of the Court.

JOHN P. HEHMAN
Clerk

$ 50.00 Filing Fee
$3,600.14 Costs
November 17, 1978 — Issued as Mandate

APPENDIX C

MEMORANDUM OPINION AND ORDER DENYING MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR A NEW TRIAL

(Filed May 17, 1976)

At a session of said court, held in the Federal Building, Flint, Michigan on May 17, 1976.

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This is a civil diversity action for alleged libel under the laws of the State of Michigan. Following a trial by jury, judgment was entered in favor of the plaintiff on March 24, 1976, awarding plaintiff $5,000.00 as compensatory damages and $15,000.00 as exemplary damages. Defendant has moved the Court for judgment notwithstanding the verdict or in the alternative for a new trial pursuant to Rules 50 (b) and 59, Federal Rules of Civil Procedure.

Pursuant to Local Rule IX(j), Rules of the United States District Court for the Eastern District of Michigan, the Court in its discretion will decide the above matter without oral argument.

Defendant has raised many issues in its motion, many of which are not commented on in its brief, which issues were considered thoroughly by the Court at trial. These issues will not be fully rediscussed at this time.

After due consideration of the issues raised by defendant, with the Court being fully advised in the premises, the motion will be denied.

Defendant claims that there was no showing of malice which would rebut the application of the qualified privilege under Michigan law. Malice under Michigan law has objective as well as subjective elements. It includes not only subjective hostility, spite, or ill-will, but also reckless disregard for the truth. *Lawrence* v *Fox*, 357 Mich 134,

141-144 (1959); *Nuyen* v *Slater*, 372 Mich 654, 660 (1964); *Gross* v *Abernathy*, 47 Mich App 703 (1973).

The Court finds sufficient evidence from which the jury could conclude that defendant acted with reckless disregard for the truth. The newspaper's witnesses admitted that the article as published did not follow the Associated Press print-out. The article was prepared in haste with the acting editor directing the reporter to change the story so that it did not merely repeat the story provided by the Associated Press. This the reporter did, and although the reporter testified that the change was based on his notes from interviews with Deputy Runyan, these notes were not produced but were claimed to have been lost. The reporter also could not recall when he had talked to Deputy Runyan other than when the investigation against plaintiff had just begun. He could not recall whether he had checked the court file, but as the story appeared immediately after the charges against plaintiff had been issued, and with the story being prepared in haste at the last moment, it seemed very unlikely that the allegations in the article were derived from the court file. Even if they were, the file did not support much of the matter set forth in the article.

Deputy Runyan also did not recall when he had any interview with the newspaper reporter. He did testify that he must have talked with the reporter, for he recognized his face. Deputy Runyan went on to volunteer that the interview must have taken place at plaintiff's arraignment on charged violations of the Michigan Securities Act, giving as his reason that all of the reporters would have been present and spoken with him at such an important event. The reporter for the Argus Press testified, though, that he was not present at plaintiff's arraignment.

The newspaper witnesses were vague and evasive. They were unable to recall the steps taken to investigate the story. They could not produce evidence of their investigation. Against this must be contrasted the stark fact that the newspaper article as printed at the very top of the front page

of the Argus Press differed dramatically from the story distributed by the Associated Press. From these facts, the jury could reasonably have concluded that the newspaper had not based the story on information received from reliable sources but had acted in haste and injected speculation, rumor, and suspicion in order to spectacularize the account of the proceedings against plaintiff. The jury could likewise conclude that defendant had a high degree of awareness that the matter added to the Associated Press release was not based on reliable information and was in all probability false. The newspaper witnesses' unsupported assertions to the contrary lacked credibility.

As the jury could find that defendant newspaper acted with malice by showing a reckless disregard for the truth, the jury could conclude that the Michigan qualified privilege was not a bar to compensatory damages. *Lawrence* v *Fox, supra; Nuyen* v *Slater, supra.* For the same reason, the jury could award plaintiff punitive damages under Michigan law without infringing on the protective policies embodied in the First Amendment. *Gertz* v *Welch*, 418 US 323, 94 S Ct 2997, 41 L Ed 2d 789 (1974); *Time Inc* v *Firestone*, US , S Ct , L Ed 2d , 44 LW 4262 (3/2/76).

Defendant also claims that the newspaper article was privileged as it was a fair and accurate report of the criminal proceeding initiated against plaintiff. MCLA 600.-2911; MSA 27A.2911. The article did not limit itself to the charges against plaintiff and fair comment on those changes as is contended by defendant but went on to describe the investment scheme as a swindle and an attempt to take $250,000 from local investors. It was for the jury to determine whether these characterizations and comments by the newspaper were a fair and accurate report of the criminal proceedings and whether any difference would have produced a different effect on the reader. *McCracken* v *Evening News*, 3 Mich App 32 (1966). Likewise, it was for the jury to determine whether the article when taken in its entirety was substantially true. *Bonkowski* v *Arlans*, 383

Mich 90 (1970); *Poledna* v *Bendix Aviation Corp*, 360 Mich 129 (1960); *Grist* v *Upjohn*, 16 Mich App 452 (1969). The jury had sufficient evidence on both issues to find in favor of the plaintiff.

The Court also finds sufficient evidence from which the jury could return a verdict for compensatory damages.

The remaining issues raised by defendant are not concerned with the sufficiency of the evidence but alleged errors at trial. Defendant claims the Court erred in failing to instruct the jury that mitigating circumstances could be considered in determining compensatory damages. Defendant relies on MCLA 600.2911 (3), MSA 27A.2911 (3), which states in relevant part:

> "In any action for slander or for publishing a libel even though the defendant has pleaded or attempted to prove a justification he may prove mitigating circumstances including the source of his information and the ground for his belief."

Defendant claims that under this statute, the jury should have been instructed that it could consider evidence of defendant's lack of malice to mitigate damages.

There are two problems with defendant's argument. The first is that the statute does not authorize the reduction of compensatory damages because of evidence of lack of malice. Rather, the statutory provision is aimed at the Michigan rule that a plaintiff's compensatory damage award may be increased as a result of malice by the defendant. The Committee Comment to the statute states:

> "This section is drawn entirely from the present statute and should therefore be considered in light of the interpretation of the present statute. Note especially the cases of Schattler v Daily Herald Co., (1910) 162 Mich 115 and Rabior v Kelley, 194 Mich 107 (1916) which state the proposition that although the plaintiff is limited to actual damages, actual

damages may be increased and augmented as a result of the malice of the defendant."

The statutory comment makes it plain that the statute allows a defendant to prove lack of malice where the defendant has attempted to prove truth as a defense in order to keep compensatory damages from being increased.

In *Schattler* v *Daily Herald Co*, 127 NW 42, 162 Mich 115 (1910), it was so held. The Court ruled that while actual damages may be increased by the reason of the malice of the defendant, in no case may good faith serve to mitigate the damages which plaintiff actually suffers.

The Court instructed the jury that it may award plaintiff only the actual damages suffered by plaintiff in any award for compensatory damages. The Court fully complied with the statutory provision in a way completely favorable to defendant.

Secondly, the jury considered the issue of malice in regards to the applicability of the qualified privilege under Michigan law. The jury was instructed that if it found that defendant acted without malice, it must return a verdict of no cause of action. In regards to this instruction, the jury was informed that the burden was on the plaintiff to prove that defendant acted with malice. Thus, the jury was instructed to return a verdict for defendant unless plaintiff had proven malice by a preponderance of the evidence.

Defendant claims that the jury should also have been instructed that it could consider the lack of malice to mitigate compensatory damages. However, if defendant was not able to prevail on this issue when the burden was placed on the plaintiff, it is difficult to see how defendant could have prevailed on the issue in regards to mitigation when the burden would have been on itself. To have instructed the jury in the manner requested by defendant would have been both contradictory and confusing.

Defendant claims as error the admission into evidence of letters received from prospective lessees in the proposed shopping mall as business records. Even if such were error, such error was harmless, as plaintiff introduced into evidence the depositions of the prospective lessees. Moreover, there was nothing in the letters which could be construed as prejudicial to defendant.

After complete consideration of the matter, the Court finds that the letters were a trustworthy account of the proposed transaction between plaintiff and the prospective lessees, which were admissible under 803 (6) of the Federal Rules of Evidence.

The Court finds no merit in the other matters raised by defendant. Accordingly, the motions are hereby DENIED.

IT IS SO ORDERED.

(s) James Harvey
United States District Judge

APPENDIX D

ORDER

At a session of said Court, held in the Federal Building, Flint, Michigan on December 18, 1978

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

Pursuant to the judgment of the Court of Appeals for the Sixth Circuit filed with regard to the above-captioned case with this Court on November 21, 1978, IT IS HEREBY ORDERED that the action be dismissed.

IT IS SO ORDERED.

JAMES HARVEY
United States District Judge